STATE OF MICHIGAN
IN THE SUPREME COURT

LISA ROBERTS,

Plaintiff-Appellee

vs.

MICHAEL ATKINS, M.D.,

Defendant-Appellant

and

MECOSTA COUNTY GENERAL HOSPITAL, GAIL A. DESNOYERS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., f/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants

SC: 122312
COA: 212675
Mecosta CC: 97-012006-NH

LISA ROBERTS,

Plaintiff-Appellee

vs.

GAIL A. DESNOYERS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., f/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants-Appellants

and

MECOSTA COUNTY GENERAL HOSPITAL and MICHAEL ATKINS, M.D.,

Defendants

SC: 122335
COA: 212675
Mecosta CC: 97-012006-NH

LISA ROBERTS,

Plaintiff-Appellee

vs.

SC: 122338
COA: 212675
Mecosta CC: 97-012006-NH

MECOSTA COUNTY GENERAL HOSPITAL,

Defendant-Appellant

and

GAIL A. DESNOYERS, M.D., MICHAEL ATKINS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., d/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants

_____/

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY

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STATEMENT REGARDING THE BASIS FOR JURISDICTION

MSMS refers this Court to the jurisdictional statement contained in the Brief of Defendant-Appellant Michael L. Atkins, M.D.

STATEMENT OF QUESTIONS PRESENTED

1. A plaintiff is statutorily required to give a defendant detailed information regarding the nature of a claim 182 days before filing a medical malpractice action. In addition to naming the health care professionals and facilities to whom the notice is directed, the plaintiff must specify the factual basis for the claim, the applicable standard of care, the alleged breach of the standard of care, and the manner in which the alleged breach proximately injured the plaintiff. The notice given by Ms. Roberts in this case failed to provide the requisite information. The Court of Appeals nonetheless held that the notice complied with the statutory requirements. Did the Court of Appeals err in failing to require adherence to the unambiguous statutory requirements?

The Trial Court would say "Yes."
The Court of Appeals would say "No."
Plaintiff-Appellee says "No."
Defendants-Appellants say "Yes."
Amicus Curiae MSMS says "Yes."

2. Does the plain meaning of the notice provision, and this Court's prior pronouncements regarding this statute and related tort reform provisions, prohibit anything less than full compliance with its specific requirements?

The Trial Court would say "Yes."
The Court of Appeals did not expressly answer this question.
Plaintiff-Appellee says "No."
Defendants-Appellants say "Yes."
Amicus Curiae MSMS says "Yes."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS[1]

This case involves the enforceability of a 182-day notice requirement that was enacted as part of the Michigan Tort Reform Act of 1993, PA 1993, No 78. Plaintiff-Appellee Lisa Roberts did not provide the information that the statute requires when she gave notice of her intent to file a claim for the alleged failure to diagnose and properly treat an ectopic pregnancy. As is more fully explained in the Briefs of Defendants-Appellants, an August 15, 1996 Notice of Intent and September 19, 1996 Amended Notice of Intent directed to Mecosta County General Hospital ("Mecosta Hospital") and September 23, 1996 Notice of Intent directed to Michael Atkins, M.D., an emergency room physician, and Dr. Gail DesNoyers, Barb Davis and Obstetrics & Gynecology of Big Rapids, P.C., Ms. Roberts' obstetrical providers, did not articulate the applicable standards of care, the manner in which the standards of care were breached by the Defendants, the steps that should have been taken by each Defendant to comply with the standard, and the manner in which the alleged breaches of the standards of care proximately caused Ms. Roberts' injury. *See* August 15, 1996 NOI, Apx. at 7A-8A; September 17, 1996 Amended NOI, Apx. at 9A-10A; September 23, 1996 NOI, Apx. at. 11A-13A. Additionally, the Notice failed to describe the factual basis for the claim against Dr. Atkins.[2]

Defendants-Appellants Atkins and Mecosta Hospital moved for summary disposition asserting, as a basis, non-compliance with the notice provision. The Trial Court granted the motions and dismissed the action with prejudice. Orders Granting Motions for Summary

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[1] Appendix cites refer to the Appendix of Defendant-Appellant Atkins unless otherwise noted.

[2] Further, Dr. Atkins claims not to have received the notice until after the litigation was commenced.

Disposition, Apx. at 85A-88A. The Trial Court reasoned that because Ms. Roberts' purported notice was insufficient on its face, it failed to constitute notice within the meaning of the statute and did not toll the time within which an action could be filed. Ms. Roberts' claims were therefore time-barred. *Id.*

Defendants Gail DesNoyers, M.D., Barb Davis, and Obstetrics & Gynecology of Big Rapids, P.C., subsequently moved for summary disposition on the same basis. Ms. Roberts, on the other hand, moved for reconsideration. The Court agreed to reconsider the motions in light of the following issues: (a) whether substantial compliance satisfies the notice requirement; (b) whether defendants must show prejudice as a prerequisite to dismissal; and (c) whether the notice provision is constitutional. Opinion and Order dated Oct. 22, 1997, Apx. at. 177A-178A. Following consideration of these issues, the Trial Court reaffirmed the entry of summary disposition in Defendants' favor. Opinion dated May 6, 1998, Apx. at. 181A-191A. The Trial Court observed that the Court of Appeals had already decided, in *Neal v Oakwood Hospital*, 226 Mich App 701; 575 NW2d 68 (1997), that noncompliance with the notice requirement warrants dismissal, even when prejudice to the defendant is not shown. Further, the *Neal* court rejected constitutional challenges on due process, equal protection, right of access to the courts, and separation of powers grounds. *With respect to the substantial compliance issue, the Trial Court opined that to read such a provision into the statute would violate "both the purpose and the plain language of the statute."* Opinion dated May 6, 1998 (emphasis added), Apx. at 189A. An Order of Dismissal With Prejudice, affirming the prior orders and additionally dismissing Dr. Desnoyers, Barb Davis and Obstetrics & Gynecology of Big Rapids, was entered on June 17, 1998. Apx. at 192A-194A.

Ms. Roberts appealed. The Court of Appeals did not consider the issues addressed by the Trial Court. Rather, in a March 3, 2000 published opinion, the Court of Appeals reversed on a basis raised by Ms. Roberts for the first time on appeal - that Defendants waived their right to assert that the notice was deficient by failing to so advise Ms. Roberts before the complaint was filed. *Roberts v Mecosta County General Hospital,* 240 Mich App 175; 610 NW2d 285 (2000). Ignoring earlier Court of Appeals decisions addressing the very statute at issue, the Court announced an expansive exception to the notice requirement that did not consider, and went well-beyond, the facts of the case before it:

> Accordingly, we hold that any objections to a notice of intent under §2912b(1) must be raised before the filing of the complaint. Summary disposition based on any alleged defect in the notice of intent not raised by the defendant before the filing of the complaint is not appropriate [footnote omitted]. In other words, if the defendant does not object to the notice before litigation is filed, then the notice must have been adequate to guide the defendant through the precomplaint investigation and negotiation stage. In such case, there is no reason for the trial court to inquire into the adequacy of the notice after the complaint is filed.

240 Mich App at 185-86

This Court granted leave to appeal from the Court of Appeals decision and reversed, holding that the tolling provision of MCL 600.5856(d) is not triggered if notice is not given in compliance "with all of the provisions of MCL 600.2912b." 466 Mich at 59. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 59; 642 NW2d 663 (2002). Rejecting the waiver holding, this Court remanded the case back to the Court of Appeals to decide whether the notice complied with the statutory requirements. On remand, the Court of Appeals held that it did. 252 Mich App 664; 653 NW2d 441 (2002). This Court again granted leave to appeal from the Court of Appeals decision, directing the parties to address "whether plaintiff complied with the requirements of MCL 600.2912b(4) and whether strict compliance or some lesser standard of

compliance applies to plaintiff's notice of intent under that provision." *Roberts v Atkins*, 2003 Mich LEXIS 469 (March 25, 2003).

ARGUMENT

STATEMENT IDENTIFYING THE STANDARD OF REVIEW

The question raised on appeal, involving a dispositive issue, is subject to de novo review. *Wortelboer v Benzie County*, 212 Mich App 208, 210; 537 NW2d 603, 605 (1995). Issues of statutory construction are also subject to de novo review. *Roberts v Mecosta County General Hospital,* 466 Mich 57, 62; 642 NW2d 663 (2002).

I. AS THIS COURT HAS PREVIOUSLY HELD, THE STATUTE OF LIMITATIONS IS NOT TOLLED DURING THE STATUTORY NOTICE PERIOD UNLESS THE NOTICE OF INTENT TO SUE FULLY COMPLIES WITH ALL OF THE STATUTORY REQUIREMENTS.

The tort reform compliance standard raised by this appeal is a matter of grave importance to Michigan's medical community. The medical malpractice presuit notice provision is part of a comprehensive reform plan implemented by the Legislature over an approximate ten-year period to address the dramatic increase in lawsuit filings and the exorbitant judgments awarded in medical malpractice litigation. Among the Legislature's ongoing goals were to reduce liability costs and increase the availability of health care while, at the same time, improving patient care and physician accountability, and reducing malpractice.[3] Reforms enacted in 1986, 1993 and 1995 touched nearly every aspect of the substantive process from this prefiling notice

[3] Provisions to improve patient care and physician accountability include "whistle blowing" mandates, MCL 333.20176a; requirements regarding the reporting of licensing violations, MCL 333.16222; MCL 333.16223; and provisions to improve the disciplinary process, MCL 333.16231; MCL 333.16237. There are also requirements for reporting to the public, advising the public of disciplinary actions, and informing the public of the procedure for filing a complaint. MCL 333.16239; MCL 333.16241; and MCL 333.20194.

requirement,[4] to an expedited means for the exchange of releases and medical records,[5] to the requirement that complaints and answers be supported by an affidavit of merit.[6] There is also a procedure for the consensual arbitration of medical malpractice claims after the required notice is given. MCL 600.2912g. Further, MCL 600.2169 establishes certain criteria for expert testimony. Other provisions govern the burden of proof, MCL 600.2912a; reduce the statute of limitations for minors, MCL 600.5851; impose a statute of repose which, absent certain exceptions, disallows claims commenced more than six years after the act or omission which is the basis for the claim, MCL 600.5838a; impose interest penalties if medical records are not provided in accordance with the records exchange requirements, MCL 600.6013(11) and (12); prescribe certain rules regarding joint and several liability; and require that the jury make specific findings to allocate fault among parties and other persons. MCL 600.6304. As to the later provisions, although 1995 amendments eliminated joint liability for most tort plaintiffs, it has been preserved for medical malpractice plaintiffs wholly without fault. MCL 600.6304(6)(a).[7]

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[4] MCL 600.2912b requires 182 days' notice of intent to commence an action for medical malpractice which must include information regarding the factual and medical basis for the claim. Similar information regarding defense of the claim is to be provided by the health professional or facility to whom the notice is directed. MCL 600.2912b(7).

[5] To facilitate investigation, the statute provides for the exchange of medical records and releases within 56 days after the notice is given, MCL 600.2912b(5); and the physician-patient privilege is deemed waived during the notice period as to matters involved in the claim. MCL 600.2912f.

[6] If, after the pre-filing exchange and investigation, the claim is not resolved and the plaintiff elects to pursue the matter further, the plaintiff must file with the complaint an "affidavit of merit" attesting that the claim has, at least, preliminary merit. The health care provider is likewise required to file an "affidavit of meritorious defense" within 91 days after the filing of the plaintiff's affidavit of merit. MCL 600.2912d; MCL 600.2912e.

[7] The tort reform acts referred to above also contain other provisions that are not listed or described here.

The notice statute, MCL 600.2912b is an integral component of this interrelated network of legislative reforms. Pursuant to the statute, a person "shall not commence" an action for medical malpractice unless the person notifies each defendant, at least 182 days before a complaint is filed, of the intent to file a claim. The provision states in pertinent part:

> (1) Except as otherwise provided in this section, a person *shall not commence* an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

MCL 600.2912b (emphasis added).[8]

The statute is specific with respect to the content of the notice, the issue raised by this appeal. MCL 600.2912b(4) provides (with emphasis added):

> The notice given to a health professional or health facility under this section *shall contain a statement of at least all of the following:*
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.[9]

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[8] The notice period is shortened to 91 days under certain circumstances such as where the claimant previously filed notice or commenced an action against other health professionals or facilities involved in the claim. MCL 600.2912b(3).

[9] Similar information is to be provided by the health professional or facility to whom the notice

If proper notice is not sent, a complaint will be dismissed. *Neal v Oakwood Hospital,* 226 Mich App 701; 575 NW2d 68 (1997). If notice is given in compliance with the statute, however, a statute of limitations period that would otherwise expire during the notice period will be tolled for the number of days in the applicable notice period. MCL 600.5856(d). MCL 600.5856(d) provides in pertinent part:

> The statutes of limitations or repose are tolled:
>
> If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations . . . for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

The language of the statute is unquestionably mandatory ("a person shall not commence an action alleging medical malpractice . . . unless the person has given . . . written notice . . ."), and tolling of the statute of limitations does not begin until after "notice is given in compliance with" the statute. *Roberts, supra.*

A. The Plain and Unambiguous Language of the Statutory Notice Provision Requires Full Compliance With Each of the Content Requirements.

1. The Notice Statute Must Be Applied As Written.

The statutory notice provision is clear and unambiguous, and must be enforced as written, as this Court recently held in *Roberts, supra.* Opining that "[b]ecause § 2912b is unambiguous, we must enforce its plain language," this Court determined that the Legislature's use of the word

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is directed, MCL 600.2912b(7), but if the health professional fails to do so, the claimant may commence an action upon expiration of that period. MCL 600.2912b(8). An action may also be earlier commenced if, at any time during the applicable notice period, the health professional informs the claimant in writing that he does not intend to settle the claim. MCL 600.2912b(9).

"shall" made the specified content of notice mandatory. Construing MCL 600.2912b(4) ["the notice given to a health professional or health facility under this section shall contain . . ."] - the very provision at issue here – and MCL 600.2912b(1) ["a person shall not commence an action alleging medical malpractice . . ."], this Court stated that "[t]he phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action." *Roberts*, 466 Mich at 65.[10] Rejecting the Court of Appeals' imposition of a requirement that a Defendant object to the sufficiency of notice before the complaint is filed or waive its objection, this Court refused to impose a duty upon defendants that did not appear in the statute. This Court deemed itself without authority to impose "an extrastatutory affirmative duty on the defendant" as the "role of the judiciary is not to engage in legislation." *Roberts,* 466 Mich at 66.[11]

The rules of statutory construction that were applied by this Court to reach the result in *Roberts* were more recently articulated in *In re Certified Question, Henes Special Projects*

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[10] *See also, Macomb County Road Comm'n v Fisher*, 170 Mich App 697, 700; 428 NW2d 744 (1988)("[T]he word 'shall' is generally used to designate a mandatory provision, while the word 'may' designates a provision that grants discretion."); *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 699; 607 NW2d 134 (1999), *appeal granted*, 463 Mich 906; 618 NW2d 915 (2000), *appeal dismissed* 630 NW2d 331 (2001)("Use of the word 'shall' indicates that the required action is mandatory, not permissive, unless this interpretation 'would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole.'")(quoting *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982)); *Depyper v Safeco Ins Co*, 232 Mich App 433, 438; 591 NW2d 344 (1998)("The use of the word 'shall' in a statute connotes a mandatory duty or requirement.").

[11] The holding in *Roberts* is consistent with this Court's earlier pronouncement regarding the notice provision in *Omelenchuck v City of Warren,* 461 Mich 567, 575-576; 609 NW2d 177 (2000). In *Omelenchuck*, this Court explained that it understood the phrase in MCL 600.5856(d) which tolls the limitations period for a number of days equal to the number of days in the applicable notice period "after the date notice is given in compliance with" MCL 600.2912b to be "legislative emphasis that the limitation period cannot be tolled unless the plaintiffs have complied with the provisions of MCL 600.2912b; MSA 27A.2912(2)." *Omelenchuck*, 461 Mich at 576.

Procurement, Marketing and Consulting Corp v Continental Biomass Industries, Inc, 2003 Mich LEXIS 772; 659 NW2d 597 (April 23, 2003), a case certified to this Court by the Sixth Circuit Court of Appeals to determine the standard for assessing double damages under the Michigan Sales Representative Commission Act. In explaining the requisite analysis, this Court said (with emphasis added):

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin,* 443 Mich 59, 65; 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward,* 460 Mich 230; 596 NW2d 119 (1999). *When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. Turner v Auto Club Ins Ass'n,* 448 Mich 22, 27; 528 NW2d 681 (1995).

See also, Eggleston v Bio-Medical Applications of Detroit, Inc, 2003 Mich LEXIS 459; 658 NW2d 139 (2003)("If the language of a statute is clear, no further analysis is necessary or allowed."); *Omelenchuck,* 461 Mich at 575 (refusing to rewrite the tolling statute to add words to the statute); *Sun Valley Foods Co v Ward,* 460 Mich. 230, 236; 596 NW2d 119 (1999)(the Court's primary task of discerning and giving effect to the Legislative intent "begins by examining the language of the statute itself"); *People v Herron,* 464 Mich 593, 611; 628 NW2d 528 (2001)("We must give the words of a statute their plain and ordinary meaning . . . .")(quoting *People v Morey,* 461 Mich 325, 329-30; 603 NW2d 250 (1999)); *Storey v Meijer, Inc,* 431 Mich 368, 376; 429 NW2d 169 (1988)("Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no further interpretation is necessary.").

A court may not speculate about the Legislature's intent beyond the words expressed. *Omne Financial, Inc v Shacks*, 460 Mich 305, 311; 596 NW2d 591 (1999). Nor may a court second-guess the wisdom of the statute. Rather, "the law must be enforced as written." *See Department of Transportation v Thrasher,* 196 Mich App 320, 323-324; 493 NW2d 457 (1992)("We believe the plain and ordinary meaning of the statutory language is clear, and judicial construction is neither necessary nor permitted.").

These rules are particularly applicable to the issue before this Court. They do not permit anything less than full compliance with the statutory notice requirements, as this Court has held on prior occasions.

2. Attempts to Dilute the Notice Provision Have Been Consistently Rejected by Michigan's Appellate Courts.

This is not the first time litigants have sought appellate condonation of less than full compliance with the statutory notice requirement. Michigan courts, however, have consistently refused to dilute the clearly articulated Legislative intent. Indeed, in *Rheaume v Vandenberg*, 232 Mich App 417; 591 NW2d 331 (1998), the Court of Appeals rejected plaintiff's assertion that substantial compliance with the notice requirement sufficed.

In *Rheaume,* three days before the statute of limitations was to expire, plaintiff filed a medical malpractice action against a physical therapy center and a "John Doe," who was described as "one of defendant's physical therapists." Notice of intent to sue was mailed to the physical therapy center the same day the action was commenced. The notice purported to broadly apply to related individuals and entities, specifically, the physical therapy center and "all agents, physicians, physical therapists, and/or employees, actual or ostensible, thereof." Plaintiff learned the identity of the Joe Doe physical therapist defendant two months later and amended

the complaint. The defendant physical therapist moved for summary disposition arguing that because the notice of intent did not include his name, it did not toll the now expired limitations period. As in this case, plaintiff argued that substantial compliance with the requirements of MCL 600.2912b, resulting in actual notice to the defendant, was sufficient to toll the statute of limitations pursuant to MCL 600.5856(d). The Court of Appeals disagreed, holding that the "Legislature's use of the word 'shall' in subsection 4 of § 2912b makes mandatory the inclusion of the 'names of all health professionals' notified of an intention to sue" and does not encompass "the broad description of defendant Vandenberg that was included in ... plaintiffs' notice." *Id.* at 423. The Court further explained:

> Simply put, a description is not a name. Because the specific statutory language of § 2912b is clear and unambiguous, we are bound to apply it as written. By failing to include defendant Vandenberg's "name" in their notice of intent to sue, plaintiffs failed to comply with a specific mandatory requirement of § 2912(4). Therefore, the statute of limitations was not tolled pursuant to MCL 600.5856(d); MSA 27A.5856(d), and plaintiffs' complaint naming Vandenberg as a defendant was not timely filed.

Id. at 423-424.

In *Neal v Oakwood Hospital, supra,* the Court of Appeals rejected the assertion that the remedy for plaintiff's failure to give notice should be a stay of proceedings, rather than dismissal of the action. The Court explained:

> First, the purpose of the notice requirement contained in § 2912b(1) is not to prevent prejudice to a potential defendant, but rather is to encourage settlement without the need for formal litigation ... Second, were we to hold that a plaintiff's noncompliance with § 2912b(1) requires dismissal only if the noncompliance prejudices the defendant, we would be supplying a judicial gloss contrary to the clear statutory language mandating that "a person *shall not commence* an action alleging medical malpractice ... unless the person has given ... written notice ... not less than 182 days before the action is commenced."

Neal, 226 Mich App at 715 (emphasis in original). *See also, Dorris v Detroit Osteopathic Hospital,* 460 Mich 26, 28; 594 NW2d 455 (1999)(the "appropriate sanction for the failure to provide a notice of intent to sue is dismissal without prejudice"); *Morrison v Dickinson,* 217 Mich App 308; 551 NW2d 449 (1996)(holding that the Trial Court erred when it failed to dismiss plaintiff's complaint for failure to comply with the statutory notice mandate).

Strict compliance with other tort reform provisions has also been the predominant rule. Adopting the Court of Appeals opinion in *Scarsella v Pollak,* 461 Mich 547, 549; 607 NW2d 711 (2000) (with two points of clarification), this Court rejected plaintiff's partial attempt to comply with the statutory affidavit of merit requirement *because such a reading would have conflicted with the plain language of the statute.* [12] Plaintiff had argued that he should have been permitted to amend the complaint by appending an untimely affidavit, which would then relate back to the original date of filing. This Court did not agree:

> We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint.

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[12] The affidavit of merit provision, a tort reform companion to the notice requirement, requires a plaintiff to file with the complaint, an affidavit of merit signed by an expert in the same specialty as the defendant, attesting to the applicable standard of care, the expert's belief that the standard of care was breached, the actions that should have been taken or omitted to comply with the standard of care, and the manner in which the breach proximately caused plaintiff's alleged injuries. MCL 600.2912d.

Scarsella, 461 Mich at 550. This Court held that the Legislature's use of the word "shall" indicates "that an affidavit accompanying the complaint is mandatory and imperative." Thus "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit" and "did not toll the period of limitation." *Id.* at 550. Dismissal with prejudice was ordered.

In *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000), the Court of Appeals held that courts may not excuse the late filing of an affidavit of merit based upon an amorphous finding of "good cause." It further held that an unsworn affidavit of merit does not constitute the "affidavit" required by MCL 600.2912d(1), and that an untimely affidavit of merit does not "relate back" to the filing date of the original complaint.[13]

There is no turning back on this well-established body of law. Michigan's appellate courts, including this Court, have required, over a period of several years, full compliance with the Legislature's reform directives. The notice provision and accompanying tort reform statutes have been applied as written. Exceptions which do not exist cannot be judicially created.

3. The Legislature Has Not Incorporated a Substantial Compliance Standard into the Statute, Evidencing Its Plain Intent to Require Full Compliance With the Notice Content Requirements.

Recognizing less than full compliance with the statutory requirements is akin to legislating, an activity this Court typically avoids. Indeed, when the Legislature has deemed less than full compliance to be a sufficient observance of the statute's directives, it has explicitly said

[13] *Barlett v North Ottawa Community Hospital*, 244 Mich App 685; 625 NW2d 470 (2001), the Court of Appeals affirmed the dismissal of plaintiff's complaint *with prejudice* because plaintiff failed to file the requisite affidavit of merit. Although plaintiff filed a motion to extend the time for filing the affidavit, plaintiff did not notice the motion for hearing and it was not called to the Trial Court's attention until more than four months after the statute of limitations expired.

so in the statute, including other notice statutes. For example, Section 27 of the Administrative Procedures Act, MCL 24.227, provides:

> (1) A guideline adopted after the effective date of this section is not valid unless processed in substantial compliance with sections 24, 25, and 26. However, inadvertent failure to give notice to any person as required by section 24 does not invalidate a guideline which was otherwise processed in substantial compliance with sections 24, 25 and 26.

Similarly, MCL 500.6031(1) regarding mutual insurance companies provides:

> If a mutual company complies substantially and in good faith with the notice requirements of this chapter, the mutual company's failure to give a member any required notice does not impair the validity of any action taken under this chapter...

Numerous other statutes explicitly adopt a substantial compliance standard. For example, MCL 570.1302, Section 302 of the Michigan Construction Lien Act, requires only substantial compliance with the statutory requirements to create a valid lien. It states in pertinent part (with emphasis added):

> (1) This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents and purposes of this act. *Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.*[14]

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[14] Even when such a provision exists, this Court has stated that its applicable scope requires a case by case analysis which considers "the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a 'substantial compliance' clause; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes 'substantial compliance' within a particular context; and, of course, the specific language of the 'substantial compliance' and other provisions of the statute." *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest Inc*, 461 Mich 316, 322; 603 NW2d 257 (1999). This Court further held that this substantial compliance language should not be "interpreted so broadly as to authorize the Court to dispense with the Legislature's explicit mandates." *Id.* at 321, fn 15.

MCL 570.262, governing liens for oil and gas wells and pipelines, is nearly identical. Similar provisions appear in MCL 462.45, governing railroads ("A substantial compliance with the requirements of this act shall be sufficient to give effect to all rules, acts and regulations of the commission ...") and MCL 500.404, governing authorization of insurers ("Every ... insurer doing business in this state shall at all times be subject to the same standards and requirements concerning financial conditions and shall be in substantial compliance with those standards and requirements.").

A substantial compliance standard also appears in the Fire Prevention Code. MCL 29.11 states:

> A substantial compliance with the requirements of sections 8 and 9 shall be sufficient to give full force and effect to a [sic] order of the state fire marshal and the order shall not be declared invalid, inoperative, or void for an omission or for a reason not affecting the merit and substance of the subject matter of the order.

Similar provisions exist in the Administrative Procedures Act, where the Legislature required full compliance with some statutory requirements and substantial compliance with others. MCL 24.243 provides:

> (1) Except in the case of an emergency rule promulgated in the manner described in section 48, a rule is not valid unless processed in compliance with section 42 and unless in substantial compliance with section 41(2), (3), (4), and (5).

Other statutes that expressly contain a "substantial compliance" standard include:

- MCL 500.1243 regarding insurance agent licensure ("The commissioner may issue an insurance agency or agent license directly to a lender or employee of the lender who is not an employee of an affiliated agency if the commissioner determines that the lender or employee has met the prerequisites for licensure and will conduct the sale of insurance in substantial compliance with this section.");

- MCL 700.5209 regarding guardianships ("After notice and hearing on a petition under section 5208 to terminate a limited guardianship, the court shall terminate

the limited guardianship if it determines that the minor's parent or parents have substantially complied with the limited guardianship placement plan.");

- MCL 247.476 regarding highway maintenance and construction ("All proceedings heretofore taken under this act shall not be defeated or nullified because of any irregularity therein if there has been a substantial compliance with the requirements of the said measure as hereby amended.");

- MCL 280.269 regarding drain code proceedings ("The court in which such proceedings are begun shall allow proof that the drain was necessary and conducive to the public health, convenience or welfare, and that all the steps required by law have been substantially complied with ...");

- MCL 211.10f regarding property tax assessments ("If a local assessing district does not have an assessment roll that has been certified by a qualified certified assessing officer, or if a certified assessor or a board of review for a local tax collecting unit is not in substantial compliance with the provisions of this act, the state tax commissioner shall assume jurisdiction over the assessment roll and provide for the preparation of a certified roll. ...");

- MCL 550.1610(1) regarding rate filings by nonprofit health care corporations ("...A filing shall not be considered to have been received until there has been substantial and material compliance with the requirements prescribed in subsections (6) and (8).");

- MCL 330.1232a(8) regarding mental health programs ("The department may deny certification if the community mental health services program cannot demonstrate substantial compliance with the standards established under this section.").

- MCL 123.461(3) regarding municipal youth centers ("A petition filed pursuant to subsection (2) shall be in substantial compliance with section 544c of the Michigan election law ...").[15]

Given the many contexts in which the Legislature has itself indicated that substantial compliance fulfills the statutory purpose, this Court should not read a substantial compliance standard into a statute that does not explicitly permit it. *See Freeman v Hi Temp Products, Inc,*

[15] Other provisions utilizing a substantial compliance standard include MCL 288.692(11)(b); MCL 124.288(2); MCL 570.377; MCL 324.21521; MCL 380.1323(3); MCL 440.8202(2)(b); and MCL 462.390.

229 Mich App 92, 100-101; 580 NW2d 918 (1998)("Where the Legislature views the doctrine of 'substantial compliance' acceptable, it has, at least in the BCA, specifically indicated that intent. ....The Legislature has made no similar provision for the timing of notices under either § 841a or § 842a ... It would be a usurpation of legislative prerogatives to interpolate the substantial compliance doctrine into those sections"). This is particularly so when the statute at issue has been strictly construed by the courts. *See e.g., City of South Lyon v Poyma,* 91 Mich App 238, 244; 283 NW2d 707 (1979)(refusing to adopt a substantial compliance standard when prior opinions adhered to a policy of strict compliance).

The Legislature has spoken quite plainly here. The command that the notice "shall contain" "at least all of the following" means that nothing less can suffice. "At least" states the minimum. Full or strict compliance with "at least all of the following" is the plainly expressed legislative intent. Any other standard will add language to the statute that does not exist and will eliminate language that does.

4. A Lesser Standard of Statutory Compliance Is Not Appropriate Here.

Combined with the essentially "anything goes" approach of the Court of Appeals, the substantial compliance standard is unworkable, potentially prejudicial and unfair. The clarity of a plain statutory provision is replaced with the uncertainty that less than full compliance engenders. Inaccurate, speculative and sketchy information will likely flourish under such a standard. Further, inconsistent application is bound to occur. What might be deemed substantial compliance by one court may not be deemed sufficient by another. The ambiguity will cause plaintiffs to provide less, rather than more, information, and the validity of the claim will be difficult to ascertain, preventing early evaluation and a meaningful response. The intended

purpose of the notice provision will thus be eviscerated with the concomitant alteration of the statutory framework. As this Court explained in refusing to apply the substantial compliance standard to a teacher tenure statute:

> The "substantial compliance" test has the disadvantage inherent in any subjective test; i.e., case-by-case review with no real advance guidance will be necessary. We believe both school boards and teachers themselves are better served by an objective rule with predictable results.

Breuhan v Plymouth-Canton Community Schools, 425 Mich 278, 283; 389 NW2d 85 (1986).

Effecting such change under the guise of statutory construction is not the function of this Court. In *Hanson v Board County Road Commissioners*, 465 Mich. 492; 638 NW2d 396 (2002), this Court observed that

> our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts.

Id. at 504.

It is true that this Court has applied a substantial compliance standard to other notice provisions, such as the notice that is required to be given before commencing an action against a municipality. For example, in *Brown v Owosso,* 126 Mich 91 (1901), the defendant challenged the sufficiency of the notice given of an injury sustained on a city sidewalk. This Court held that the notice was sufficiently specific to put the city on notice of the time, place, manner and extent of the accident. A similar holding was reached in *Meredith v City of Melvindale*, 381 Mich 572; 165 NW2d 7 (1969).

However, *Brown* and *Meredith* should not portend a similar conclusion here. In those cases, the notice provision was designed to put the defendant on notice so the claim could be

investigated in a timely fashion. Less that complete information fulfilled that purpose.[16] However, the goal of the medical malpractice notice provision is different. The collective aim of the malpractice notice requirement and its companion provisions is to provide the parties with an opportunity to exchange information, undertake an investigation, and assess the strengths and weaknesses of their relative positions so that meaningful settlement negotiations can be conducted prior to the commencement of litigation. A summary of the provision prior to its enactment, prepared by the House Legislative Analysis Section, explains its objectives as follows:

> promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . .

See Summary on Medical Malpractice Liability, House Legislative Analysis Section, Apx. pg. 246A-247A. Ideally, this would assist in alleviating the medical malpractice crisis and thereby increase the availability - and decrease the cost - of health care in this state.[17]

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[16] Similarly, in *Dozier v State Farm Mutual Automobile Insurance Co,* 95 Mich App 121; 290 NW2d 408 (1980), the Court of Appeals observed that the notice provision was "designed, *inter alia*, to provide time to investigate and to appropriate funds for settlement purposes." In "light of these objectives," the Court concluded "that substantial compliance with the written notice provision which does in fact apprise the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund, is sufficient compliance under 3145(1)."

[17] The Court of Appeals has repeatedly recognized the Legislature's legitimate interest in this goal. *See e.g., Bissell v Kommareddi*, 202 Mich App 578, 581; 509 NW2d 542 (1993)(the "state unquestionably has a legitimate interest in securing adequate and affordable health care for its residents"); *Sills v Oakland General Hospital*, 220 Mich App 303, 313; 559 NW2d 348 (1996)("Michigan has a legitimate interest in supporting affordable and adequate health care for its residents"); *Neal v Oakwood Hospital, supra* at 720 (notice period is "rationally related to the Legislature's objective because it is reasonable to assume that claims informally resolved or settled without resort to formal litigation will help reduce the cost of formal medical malpractice litigation").

The statute specifies precisely what the notice must contain in order to achieve this objective, and provides no exception to full adherence to the statutory requirements. Indeed, the statute provides that a person "shall not commence an action alleging medical malpractice" unless the notice is given. Thus the notice provision at issue here is more like the payment bond statute, MCL 129.207, discussed in *Anderson Co v Argonaut Insurance Co,* 62 Mich App 650; 233 NW2d 691 (1975). The statute provided that a claimant having no direct contractual relationship with the principal contractor "shall not have a right of action upon the payment bond unless" within 30 days of furnishing material or labor, written notice is given informing the principal of the nature of the labor or materials being provided, the contracting party, and the performance site, among other requirements. Plaintiff gave notice 17 days late, but argued that it should not be precluded from suing on the payment bond because it substantially complied with the statute. The Court of Appeals disagreed, stating:

> We are not out of sympathy with plaintiff's position but the plain language of the statute and the force of the precedent which we must apply in our interpretation thereof compel us to the conclusion that substantial compliance is not sufficient.
>
> . . .
>
> This statutory language regarding the notice requirement [referring to an earlier payment statute] was construed by our Supreme Court as being mandatory and creating a "condition precedent to recovery on the bond", even absent a showing that the defendant surety company had been damaged by the subcontractor's failure to serve timely notice.
>
> . . .
>
> ... [T]he Legislature has spelled out the consequences befalling the claimant "not having a direct contractual relationship with the principal contractor" who fails to comply with either notice requirement: He simply "shall not have a right of action upon the payment bond". *Such explicit language leaves very little room for judicial construction.*

62 Mich App at 693 (emphasis added). The same result is required here. The notice provision leaves no room for judicial construction. Full compliance is required.

II. MS. ROBERTS' NOTICE OF INTENT TO SUE DID NOT STRICTLY COMPLY WITH THE STATUTORY NOTICE REQUIREMENTS.

As is more fully discussed in Defendants-Appellants' Briefs on Appeal, the notice of intent to sue given by Ms. Roberts comes nowhere close to satisfying the content requirements. For example, the notice does not specify the factual basis for the claim against Dr. Atkins. Dr. Atkins saw Ms. Roberts in the Mecosta Hospital emergency room on October 8, 1994. The notice asserts that the negligence occurred on October 4, 1994 at Obstetrics & Gynecology of Big Rapids. The standard of care is directed to the obstetrical providers but it is not specific. Only general statements are made regarding an obligation to provide competent physicians and employees, and to render competent advice. The standard of care applicable to Dr. Atkins is not specified at all. The notice also fails to specify the manner in which the standard was breached, the acts required to achieve compliance with the standard, and the manner by which the breach caused the alleged injury.

The Court of Appeals clearly exceeded the bounds of its authority in deeming this notice sufficient. The insistence that "defendants direct us to no authority to establish that the stated standard of care is incorrect" and that defendants do not "direct us to the proper standard of care," turns the notice requirement on its head. The obligation to articulate the standard of care is plaintiff's obligation, not defendants' obligation. The statutory language on this point could not be more clear. The notice must contain a statement of the "applicable standard of practice or care alleged by the claimant." MCL 600.2912b(4)(b).

Equally disturbing is the Court of Appeals' conclusion that the notices "in fact" state "what plaintiff alleges to be the standard of practice or care" and that the statute does not require that the standard of care be "accurately or correctly state [d]." Certainly, the Legislature can be assumed to have intended that a plaintiff accurately state the applicable standard, and that it have support for that statement. There would be no point in requiring anything less.

RELIEF REQUESTED

For the reasons stated in this brief, Amicus Curiae Michigan State Medical Society respectfully requests that this Court reverse the Court of Appeals August 27, 2002 Opinion and hold that a full and strict compliance standard applies to MCL 600.2912b.

Dated: May 19, 2003

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STATE OF MICHIGAN
IN THE SUPREME COURT

LISA ROBERTS,

Plaintiff-Appellee

vs.

MICHAEL ATKINS, M.D.,

Defendant-Appellant

and

MECOSTA COUNTY GENERAL HOSPITAL, GAIL A. DESNOYERS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., f/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants

SC: 122312
COA: 212675
Mecosta CC: 97-012006-NH

LISA ROBERTS,

Plaintiff-Appellee

vs.

GAIL A. DESNOYERS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., f/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants-Appellants

and

MECOSTA COUNTY GENERAL HOSPITAL and MICHAEL ATKINS, M.D.,

Defendants

SC: 122335
COA: 212675
Mecosta CC: 97-012006-NH

LISA ROBERTS,

Plaintiff-Appellee

vs.

SC: 122338
COA: 212675
Mecosta CC: 97-012006-NH

MECOSTA COUNTY GENERAL HOSPITAL,

Defendant-Appellant

and

GAIL A. DESNOYERS, M.D., MICHAEL ATKINS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., d/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

Penny L. Milliken, being first duly sworn, deposes and says that she is employed with the law firm of KERR, RUSSELL AND WEBER, PLC, attorneys for Amicus Curiae Michigan State Medical Society, and that on the 19th day of May, 2003, she served via first class mail, with postage fully prepaid thereon, two copies of the Amicus Curiae Brief of Michigan State Medical Society, together with Proof of Service thereon, on:

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Subscribed and sworn to before me
this 19th day of May, 2003.

GAIL R. SHOWLER
Notary Public, Wayne County, MI
My Commission Expires Feb. 20, 2004